Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CENTURY IMPORTERS, INC.,

Petitioner,

v.

UNITED STATES,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an importer files a timely protest against a customs decision under 19 U.S.C. § 1514(a), may the importer raise legal issues and related facts (not stated to the Customs Service at the time of entry) in support of the protest either at the administrative or judicial level, or is this precluded by 19 U.S.C. § 1520(c) as the Court of Appeals for the Federal Circuit held?

STATEMENT OF PARTIES

The caption identifies all parties to the proceeding in the court whose judgment is sought to be reviewed.

The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the petitioner are Phillip Morris Co. and The Molson Companies, Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Century Importers, Inc. ("Century") petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Federal Circuit ("Court of Appeals") in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-18a) is reported at 205 F.3d 1308 (Fed. Cir. 1999). The opinion of the United States Court of International Trade ("CIT")(App., *infra*, 21a-30a), which was reversed by the Court of Appeals, is reported at 19 F. Supp. 2d 1124 (Ct. Int'l Trade 1998).

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 2000. A petition for rehearing or rehearing *en banc* was denied on May 10, 2000. (App., infra, 19a-20a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1581(a) (1994) provides:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

2. 28 U.S.C. § 2640(a) (1994) provides:

> The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:
>
> (1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.
>
> (2) Civil actions commenced under section 516 of the Tariff Act of 1930.
>
> (3) Civil actions commenced to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979.
>
> (4) Civil actions commenced under section 777(c)(2) of the Tariff Act of 1930.
>
> (5) Civil actions commenced to review any decision of the Secretary of the Treasury under section 641 of the Tariff Act of 1930, with the exception of decisions under section 641(d)(2)(B), which shall be governed by subdivision (d) of this section.

(6) Civil actions commenced under section 1582 of this title.

3. 19 U.S.C. § 1514(a)(1993) provides:

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), and section 1520 of this title (relating to refunds and errors), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

> (5) the liquidation or reliquidation of an entry, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

4. 19 U.S.C. § 1520(c)(1) (1993) provides:

> Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct-

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction.

5. 19 U.S.C. § 1401a(b)(1)(1993) provides in part:

(1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus [certain amounts such as packing, commissions, etc. not relevant to this case.]

6. 19 U.S.C. § 1401a(b)(3)(B)(1993) provides:

(3) The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable and from any cost or other item referred to in paragraph (1):

* * *

(B) The customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation, and any Federal excise tax on, or measured by the value of, such merchandise for which vendors in the United States are ordinarily liable.

7. 19 U.S.C. § 1401a(b)(4) (1993) provides as follows:

For purposes of this subsection --

(A) The term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

(B) Any rebate of, or other decrease in, the price actually paid or payable that is made

or otherwise effected between the buyer and seller after the date of the importation of the merchandise into the United States shall be disregarded in determining the transaction value under paragraph (1).

8. 19 C.F.R. § 152.103(a) (1993) provides in relevant part:

§ 152.103 Transaction value

(a) *Price actually paid or payable* --

(1) *General.* In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation. It may be the result of discounts, increases, or negotiations, or may be arrived at by the application of a formula, such as the price in effect on the date of export in the London Commodity Market. The word "payable" refers to a situation in which the price has been agreed upon, but actual payment has not been made at the time of importation. Payment may be made by letters of credit or negotiable instruments and may be made directly or indirectly.

9. 19 C.F.R. § 152.103(i)(1993) provides in relevant part:

> (i) *Exclusions from transaction value.* The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable and from any cost or other item referred to in paragraph (b) of this section:
>
> * * *
>
> (2) The customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation, and any Federal excise tax on, or measured by the value of, the merchandise for which vendors in the United States ordinarily are liable.

STATEMENT OF FACTS

1. On January 14, 1993, Molson Breweries ("Molson") entered into a series of agreements with Miller Brewing Company ("Miller") and several of their affiliates. This was a major undertaking of the companies, with negotiations commencing in April, 1992 and continuing until execution.

Pursuant to one of the agreements Molson agreed to export and sell Canadian beer to Miller at prices calculated according to a stated formula or "Transfer Price." This agreement provided that regular Customs duty would be for the account of Miller or its importing subsidiary Century. The regular duty imposed at that time was 0.8¢ per liter.[1]

While the agreements were being negotiated the United States imposed a temporary 50 percent ad valorem "retaliatory" duty on imports of beer produced in Ontario, Canada. This duty resulted from a long-running trade dispute between the United States and Canada. While in effect, it replaced the much smaller regular duty mentioned above.

Faced at the figurative last minute with the prospect that some of the beer covered by the agreements would be subject to the retaliatory duty, the parties agreed that Molson rather than Miller (or Century) would be responsible for any retaliatory duty. To effectuate this the parties entered into a separate "Import Duties letter agreement," whereby Molson contracted to "promptly pay or reimburse Miller . . . for the cost of the retaliatory import duties affecting imports of Canadian beer into the

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[1] The transfer pricing procedure was contained in "Exhibit 9(j) to the "Beer Agreement," one of an elaborate series of agreements denominated by the parties the "Molson-Miller North American Beer Alliance."

United States . . . ." The letter agreement was executed on January 14, 1993 along with the other "Alliance" agreements, and was specifically integrated into and incorporated with the "Beer Agreement" at paragraph 26(f): "This Agreement, including the attached schedules, together with . . . *the Import Duties letter agreement, dated the date hereof*, and the other agreements referred to herein, contains the entire understanding of the parties with respect to the subject matter contained herein . . . ." (Emphasis added).

When beer brewed in Ontario was imported pursuant to the agreements, Miller's importing affiliate Century advanced the retaliatory duty to gain release of the merchandise from the U.S. Customs Service ("Customs").[2] These advances were later billed back to Molson, which reimbursed Miller for the duty as provided by the Beer Agreement and the Import Duties letter agreement.

When the merchandise was imported and entered

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[2] As the importer of record, Century was legally obligated vis-à-vis Customs to pay the duties accruing on the importations. *See,* 19 CFR§ 141.1(b)(1)(1993)("liability for duties . . . attaching on importation, constitutes a personal debt due from the importer to the United States which can be discharged only by payment in full of all duties legally accruing . . ."). In addition, the regulations require that the importer of record pay the duties directly to Customs, or do so through its licenced customhouse broker. 19 CFR § 141.1(b)(3).

through Customs the parties did not bring the retaliatory duty reimbursement arrangements to the attention of Customs. There was no requirement that they do so, and the potential of these arrangements to reduce the value for duty purposes ("transaction value") was not then apparent to them. After importation, however, the parties focused on the language of 19 U.S.C. § 1401a(b)(3)(B), which provides that the "transaction value of imported merchandise does not include [t]he customs duties or other Federal taxes currently payable on the imported merchandise by reason of its importation" under certain circumstances. The parties determined that the net effect of the reimbursement provisions described above was that the transfer price included the duty; that the price in question was, therefore, effectively a duty paid price; and that the parties were entitled under § 1401a(b)(3)(B) to have the price adjusted so it did not include such duty. The parties raised this question with Customs because the import entries in question were still open and subject to adjustment at liquidation. Customs did not agree to a duty adjustment and liquidated the entries as they were entered.[3]

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[3] As the record before the CIT and Court of Appeals makes clear, where Customs agrees that a duty paid price is involved, the agency has an established procedure and formula for backing out the duty, which is to divide the price actually paid or payable by the duty rate plus 100 percent. Century Importers, Inc. v. United States, 19 F. Supp.2d 1124,1127 (Ct. Int'l. Trade 1998), rev'd, 205 F.3d 1308 (Fed. Cir. 1999).

Century protested these assessments within 90 days of the liquidation of the entries pursuant to 19 U.S.C. § 1514(a)(1), contending that the appraised value of the imported merchandise was too high in that Customs had not made the statutorily required adjustment to the duty paid transactions values. Customs denied this protest on October 18, 1994 and

Century commenced an action in the CIT pursuant to 28 U.S.C. § 1581(a), seeking *de novo* review of Customs' decision.

2. On August 17, 1998, the CIT, by Judge Jane Restani, granted Century's motion for summary judgement and ordered that the merchandise be revalued by backing out the duty from the transaction value of the imported merchandise, and that the customs entries be reliquidated accordingly. Century Importers, Inc. v. United States, 19 F. Supp.2d 1124 (Ct. Int'l Trade 1998), rev'd., 205 F.3d 1308 (Fed. Cir. 1999).

Having found that the transactions were "duty paid," the CIT stated that the transaction value statute, 19 U.S.C. § 1401a(b)(4)(B), required that the duties ultimately paid by the exporter not be included in the appraised value of the merchandise. Id. at 1127-28.[4]

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[4] The CIT rejected the United States' argument that reimbursement of the duties was a post-importation rebate, holding that "[a] repayment of identified duties is not a 'rebate of price' within the meaning of the statute." Century Importers, 19 F.

The CIT rejected the United States' argument that no deduction could be allowed because the importer failed to inform Customs at the time of entry that the importation was "duty paid." Id. The CIT determined that this was "an error in the preparation of the entry papers," and that the law provides avenues of relief to importers who are detrimentally affected by such mistakes and omissions. Id. The CIT also found that neither the statute nor the regulations require that an importer indicate at the time of entry that an entry is duty paid, id., and that "[t]here is no indication . . . that simple mistakes may not be corrected . . . ." Id.

3. On appeal the Court of Appeals for the Federal Circuit reversed. Century Importers Inc. v. United States, 205 F.3d 1308 (Fed. Cir. 1999). First, it rejected (with no citations to the record as support) the lower court's finding that the price was duty paid, instead holding that the reimbursement by the exporter of the duties was a "rebate" to the price actually paid or payable for the merchandise rather than the repayment of duties advanced by Century. Id. at 1312.

Supp.2d at 1127. 19 U.S.C. § 1401a(b)(4)(B) directs Customs to disregard rebates if those rebates reduce the price actually paid or payable for the merchandise and are "made or otherwise effected between the buyer and seller after the date of the importation of the merchandise into the United States . . . ."

While acknowledging that the evidence of record showed that the Customs Service may have allowed the deduction had it understood at the time of entry that the price was duty paid, the Court of Appeals found that Century's "error" in failing to advise the Customs Service of the alleged duty paid nature of the price could not be corrected under Section 1520(c) as a clerical error, mistake of fact, or other inadvertence because it was a mistake of law. Id. at 1312-1313. The Court of Appeals determined that "Century's repeated failure to mark its documents 'duty paid' falls outside the allowance for correction under § 1520(c)(1)," id. at 1312, and that "[c]orrection [pursuant to 19 U.S.C. § 1520(c)(1)] is not possible if the error is one in the construction of law." Id. at 1313.

4. Judge Newman filed a dissenting opinion. After noting that the "Customs Service readily acknowledged that it would have assessed the duty as Century proposes, and as required by § 1401a(b)(3), had it been advised that the invoice price included the duty," id., Judge Newman concluded that Century's failure to inform Customs of the duty paid nature of the merchandise was an unintentional error, mistake or inadvertence correctable under section 1520(c)(1). Id. at 1314. In addition, Judge Newman opined that the reimbursement of the duty by the exporter to the importer was not a rebate, but a simple agreement that the exporter would pay the duty. Id. at 1315.

5. A Combined Petition for Panel Rehearing and Rehearing En Banc was filed by Century. Both requests were denied on May 10, 2000.

REASONS FOR GRANTING THE PETITION

This case involves important Federal statutory issues. The principle of the decision of the Court of Appeals would sharply limit the rights of importers to administrative and judicial review by reversing the well established preeminence of 19 U.S.C. § 1514(a) over 19 U.S.C. § 1520(c)(2), and by preventing importers from raising legal claims after importation, notwithstanding the express intent of Congress that they be allowed to do so.

To understand the significance of the faulty analysis of all opinions below (the CIT opinion, the majority Court of Appeals decision, and Judge Newman's Court of Appeals dissent) it is critical to focus on the fact that the importer in this case filed a timely and valid protest pursuant to 19 U.S.C. § 1514(a)(1) contesting the appraised value of the imported merchandise. Pursuant to the statute, such protest places in issue "the legality of all orders and findings entering into [the decision of the Customs Service.]" 19 U.S.C. § 1514(a). While one would scarcely know it from the lower court decisions, the importer did not file a request

for correction of an error pursuant to § 1520(c)(1). The parties to the transaction did not, and do not, acknowledge that any error was made. However, because the lower courts treated the importer's failure to raise the appraisement claim at the time of entry as an "error," and treated the incorrect appraisement as flowing from such error, they analyzed the importer's rights to relief under § 1520(c)(1), which deals with correction of clerical errors and mistakes of fact, rather than § 1514(a)(1), which deals with correction of incorrect Customs appraisements. As will be shown, this approach has the potential to curtail drastically importers' long-standing rights to administrative and judicial review, not only of Customs appraisements, but of most other important Customs decisions as well.

The Nature of Section 1514. Under 19 U.S.C. § 1514 an importer may file a "protest" against any of the Customs or Treasury decisions listed therein. There is, however, a strict time limit. To be timely, a protest must be filed within 90 days of liquidation of the Customs entry, (or other relevant date in certain circumstances.) The effect of a timely protest is to relieve the initial Customs decision of its finality and to create the basis for a full review, first by the Customs Service pursuant to 19 U.S.C. § 1515(a), and then by the courts if a civil action is commenced pursuant to 28 U.S.C. § 1581(a). Congress, via 28 U.S.C. § 2640, provided the CIT with the power of *de novo* review in an action at law seeking the review of a protest denied by the Customs Service.

Thus, in an action arising out of a denial of a protest filed pursuant to 19 U.S.C. § 1514(a) and properly before the court pursuant to 28 U.S.C. § 1581(a), the CIT has the power to decide any issue, whether of law or fact, necessary to the proper application of the law and resolution of the issues -- in this case, the proper appraisement of the imported merchandise.

It makes absolutely no difference how or why the faulty appraisement or other Customs decision was caused, or whether the necessary information or arguments or legal citations were placed before Customs at the time of importation. Thus, it makes no difference whether the importer may be said to have made an "error" in failing to bring information to the attention of Customs at the time of entry as the lower courts, in fact, said here. By filing a timely protest under § 1514(a) the importer preserves its right to present any argument and evidence in support of its position before the agency or the court at a later time, and to have such matters fully and fairly considered.

Had there been any doubt, the foregoing was made clear beyond peradventure with the passage of the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274 (codified as amended in scattered sections of 28 U.S.C.). Section 207 of the Act amended 19 U.S.C. § 1514 in a number of important procedural areas including extending the period for filing a protest from

60 days to the present 90 days, and adding the appraised value of merchandise to the types of Customs decisions which could be contested by protest. Of particular importance here was a "clarifying amendment, which reflects existing law", explained as follows in the House Report:

> Finally, your committee's amendment makes clear that if an administrative decision (e.g., appraisement, classification, etc.) is properly protested within the extended 90-day period allowed under S. 2624 for filing a protest, new grounds, claims, arguments and other material in support of such a protest may be presented at any time for consideration, either in connection with administrative review of the protest, or in subsequent litigation involving the same merchandise and the same properly protested decision (without regard to whether the same claim, ground or argument was actually considered administratively in the review of the protest of such decision).

H.R. Rep. No. 91-267 (1970), reprinted in 1970 U.S.C.C.A.N. 3188, 3214. (Emphasis added.)

Congress contemplated a review mechanism whereby the Customs Service and then the courts could

correct appraisements so long as they were duly protested to the Customs Service within 90 days of liquidation. Congress did not limit an importer's relief depending upon the cause of the improper appraisement -- not even if the importer's own act, omission or "error" was the cause.

What the Court of Appeals did here is in absolute conflict with the long-standing law as clarified and restated in the Customs Courts Act of 1970; namely, when Century filed a valid, timely protest disputing the Customs appraisement and sought to present new facts and arguments in support of its claim, the Appellate Court ruled that it could not do so, being precluded by 19 U.S.C. § 1520(c)(1), as discussed below.

The Nature of Section 1520(c)(1). Reliquidation of an entry pursuant to 19 U.S.C. § 1520(c)(1), may be appropriate notwithstanding that a valid protest was not filed. Customs and the reviewing courts are limited under this provision, however, to correcting only mistakes of fact or those errors arising from clerical error or inadvertence. Specifically, section 1520(c)(1) provides:

> Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct-

> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction . . . .

This statute provides a mechanism to correct clerical error, mistake of fact or other inadvertence and an extended statute of limitations (one year as opposed to 90 days) to seek reliquidation, but only if the claim is not based on misunderstanding of the law. It is a remedial procedure, whereby mistakes that would unjustly enrich the Customs Service at the expense of importers can be corrected: "we think it would greatly facilitate our treatment in dealing with and handling the public, and consequently enhancing the efficiency of the customs service, if plainly meritorious claims for the correction of errors could be acted on." Hearings on H.R. 1535 to Amend Certain Provisions of the Tariff Act of 1930 Before the House Comm. on Ways and Means, 82d Cong., 1st Sess., 172 (Comm. print 1951).

Thus, a § 1514 protest can raise all matters of law or fact. Section 1520 is available in limited

circumstances where the importer has not availed himself of § 1514. "Section 520 thus does not control over 514; rather it permits limited relief in the situations defined therein." Phillips Petroleum Co. v. United States, 54 CCPA 7, 11, C.A.D. 893 (1966). If an importer error were based on a mistake of law, Customs and the reviewing courts would be unable to grant any relief if the action originated pursuant to section 1520, no matter how meritorious the importer's claim might be. Hambro Automotive Corp. v. United States, 603 F.2d 850, 852 (CCPA 1979)("Unless the provision of section 520(c)(1) limiting the finality of section 1514 was available . . . appellant's access to the jurisdiction of the Customs Court was precluded by its failure to avail itself of the statutory relief from the finality of [Customs'] decisions under § 1514"). In this case the Court of Appeals has reversed the statutory hierarchy, in contravention of the statement of its predecessor court in Phillips, by using § 1520(c)(2) to limit § 1514.

The Court of Appeals' Erroneous Constriction is Sweeping in Nature. The CIT has exclusive jurisdiction over a wide range of tariff protest cases, including valuation cases, and the Court of Appeals has exclusive jurisdiction over appeals from the CIT. Thus, the resolution of this issue has the substantial legal importance in that future Customs cases could be subject to the same misapplication of 19 U.S.C. § 1520(c). In cases where it may be found that the faulty customs decision flows from, or might have been avoided except for, some mistake or omission by the taxpayer (importer)

at the time of entry, the filing of a protest, contrary to years of interpretation, will no longer protect the taxpayer's claim. The CIT's plenary, *de novo* jurisdiction will be lost and the exception which is § 1520(c)(1) will subsume the rule of § 1514(a).

Section 1514 is very specific as to the types of Customs decisions that may be the subject of a protest. These include "the appraised value of merchandise . . ." as in this case, and many other types of decisions including "the classification and rate and amount of duties chargeable," "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury," and others. 19 U.S.C. §§ 1514(a)(1)-(7). Under the approach adopted by the Court of Appeals below, any type of Customs treatment or decision, if perceived to flow from some "error" by the importer at the time of entry, would be immune from review unless the requirements of § 1520(c)(1) were met. Thus, the potential significance of this case is not limited to valuation decisions (although that alone would be of great importance), but extends to virtually any type of Customs decision. This would significantly vitiate § 1514, which has been a keystone of an importing taxpayer's legal rights since enacted in the Tariff Act of 1930, with similar provisions being contained in the Act of Sept. 21, 1922, ch. 356, § 514, 42 Stat. 969 (repealed 1930); the Act of Oct. 3, 1913, ch. 16, § III, N, 38 Stat. 187 (repealed 1922); and the Customs Administration Act of June 10, 1890, ch. 407, 26 Stat. 137, as amended by the Payne-Aldrich Tariff Act of Aug. 5, 1909, ch. 6,

§ 28, 36 Stat. 100 (repealed 1913).

If the claimant in this case had not protected its rights by filing a timely § 1514 protest, and had the claimant then sought relief under § 1520(c) to correct an alleged error, it would have been appropriate for the Court of Appeals to deal with issues such as whether there was an "error" and whether such error was a correctable error of fact or an uncorrectable error of law. As it is, however, the Court of Appeals decided the case by resolving issues that were not properly before it at all. This is reflected by the fact that neither party raised or briefed such issues, concentrating instead on the substantive issues of customs valuation law properly involved in this case. This factor renders the decision of the Court of Appeals all the more peculiar and disruptive.

By curtailing the importer's right to seek review pursuant to 19 U.S.C. § 1514(a) the Court of Appeals committed a serious precedential error. Unless corrected, that decision will stand for the rule that if a faulty customs action may be characterized as having been caused by importer "error," it may be remedied, if at all, only under § 1520(c) - not pursuant to a § 1514(a) protest. Further, if the error were to be characterized as an error "of law," there will be no remedy, as none will be available under § 1520(c). This would represent a major injustice to importers in situations similar to that of this petitioner (as the dissent recognizes) and a

significant setback and cause of confusion to jurisprudence in this area, upsetting decades of settled law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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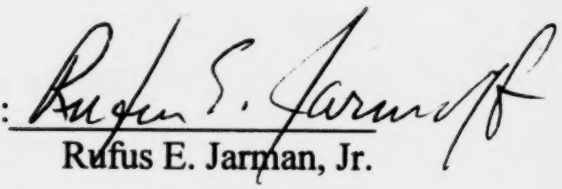
By: 
Rufus E. Jarman, Jr.

Dated: August 4, 2000

APPENDIX A

United States Court of Appeals for the Federal Circuit

99-1117

CENTURY IMPORTERS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

DECIDED: March 3, 2000

Before NEWMAN, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and RADER, Circuit Judge.

Opinion for the court filed by Circuit Judge RADER. Dissenting opinion filed by Circuit Judge NEWMAN.

RADER, Circuit Judge.

The United States Customs Service (Customs) assessed duties based on the invoice value of beer imported by Century Importers, Inc. (Century). The Canadian exporter later reimbursed Century for the duties. On summary judgment, the United States Court of International Trade agreed with Century that Customs erred by failing to deduct the reimbursed duties from the transaction price as indicated by the importer's invoice. Century Importers, Inc., v. United States, 19 F. Supp. 2d 1124 (Ct. Int'l Trade 1998). Because the Court of International Trade erred in its interpretation of 19 U.S.C. § 1401a (1994),* which governs the valuation of imported merchandise for appraisal by Customs, this court vacates and reverses.

I.

Century is a wholly owned importing subsidiary of the Miller Brewing Company of Milwaukee, Wisconsin (Miller). On January 14, 1993, Miller entered an agreement (the Beer Agreement) with Molson Breweries of Toronto, Ontario, Canada (Molson), which covered the importation, sale, advertising, and distribution of beer. Exhibit 9(j) of the Beer Agreement, titled "Calculation and Payment of Transfer Prices," set the formula for calculating the price of Molson's beer. This price -- the "transfer price" -- included production, overhead, packaging, and shipping costs. Exhibit 9(j) also included

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* All subsequent code references will be to sections of title 19.

tariffs, levies, taxes, and duties under "packaging costs" to be invoiced separately. The parties to the agreement treated these tariffs and duties as Molson's costs, which Molson would invoice separately to Miller. Because these tariff and duty costs appeared on a separate invoice, the parties did not count the duties in the price of the beer.

When Molson and Miller began to negotiate the Beer Agreement, the duty for beer imported from Canada was a specific (i.e., volume-based) rate under one cent per liter. During the negotiations, however, as a result of a trade dispute, the United States replaced the specific duty rate for beer imported from the Province of Ontario with a rate based upon value. This ad valorem rate was fifty per cent of the value of the imported product. Molson and Miller agreed, in a side letter headed "Import Duties" accompanying the Beer Agreement, that Molson would "pay or reimburse" Miller and its affiliates for the cost of these duties.

When Century later imported Molson beer, Customs assessed fifty per cent ad valorem duties based on the price stated on the invoices or bills. The invoices did not contain any statements about subsequent duty reimbursements. Customs assessed the duty based on the sales invoice price. Century paid the duty to Customs. Later Miller billed Molson for the duties, and Molson reimbursed Miller (and Century) the billed amount.

Century brought an action in the Court of International Trade seeking a refund of part of the duties it paid, contending that Customs, in calculating the duties

on the imported beer, should have deducted the reimbursed duties from the invoice price. In essence, Century argued that Molson had in reality reduced the price of its beer by agreeing to reimburse Miller for the duties. Molson had recovered, Century argued, only the invoice price minus the reimbursed duties. Therefore, Century contends that this reduction in the invoice reflects the value of the transaction.

Customs contends that it calculated the duty on the basis of 19 U.S.C. § 1401a(b)(1) which sets the "transaction value," the basis for the duty calculation, at "the price actually paid or payable for the merchandise." Customs contended that the price "actually paid" for the beer was the invoice price. According to Customs, Molson's reimbursement was a rebate. Customs treated this alleged rebate according to the statutory formula: a "rebate of, or decrease in, the price actually paid . . . after the date of the importation . . . shall be disregarded in determining the transaction value." § 1401a(b)(4)(B). Customs acknowledges that the transaction value would not include customs duties "if identified separately from the price actually paid." 19 U.S.C. § 1401a(b)(3)(B). Customs notes, however, that neither Molson nor Century separately identified at importation the customs duties later reimbursed by Molson.

Century and Customs cross-moved for summary judgment. The Court of International Trade granted Century's motion, holding that the invoice price included a component for duties which Customs should have deducted before it assessed duties. Further, the trial court reasoned that repayment of duties to the importer

after importation is not a "rebate in price" within the meaning of the statute. See Century, 19 F. Supp. 2d at 1126. Therefore, the Court of International Trade held that Molson's failure to identify separately the reimbursement agreement was a ministerial error which the parties could later correct. See id. at 1127. The Government now appeals the decision of the Court of International Trade.

II.

This court reviews a grant of summary judgment by the Court of International Trade for correctness as a matter of law. See Campbell Soup Co., Inc. v. United States, 107 F.3d 1556, 1559 (Fed. Cir. 1997); St. Paul Fire & Marine Ins. v. United States, 6 F.3d 763, 767 (Fed. Cir. 1993). When reviewing a decision by the Court of International Trade, this court reapplies the standard initially exercised by the trial court to review the agency decision. See Campbell, 107 F.3d at 1559. The decision of Customs receives a presumption of correctness which the importer has the burden to overcome. See id.; 28 U.S.C. § 2639(a)(1) (1994). This presumption is only a procedural device which allocates the burden of producing sufficient evidence. See Universal Electronics v. United States, 112 F.3d 488, 492-93 (Fed. Cir. 1997).

Title 19 authorizes Customs to determine the value of imported merchandise. See 19 U.S.C. § 1500(a) (1999). According to title 19, Customs appraises imports "on the basis of . . . (A) The transaction value provided for under subsection (b) of this section." § 1401a(a)(1). Transaction value is the "price actually paid or payable

for the merchandise." § 1401a(b)(1). Two further provisions inform the meaning of the "price actually paid or payable." Title 19 uses that phrase again in excluding rebates from the transaction value: "[a]ny rebate of, or other decrease in, the **price actually paid or payable** that is made or otherwise effected between the buyer and seller after the date of the importation . . . shall be disregarded in determining the transaction value . . . ." § 1401a(b)(4)(B)(emphasis supplied). Again, title 19 uses the phrase in excluding from transaction value several items when identified separately from the price: "[t]he transaction value . . . does not include any of the following, if identified separately from the **price actually paid or payable** . . . . (B) The customs duties . . . currently payable on the imported merchandise by reason of its importation . . . ." § 1401a(b)(3)(B) (emphasis supplied).

These provisions show that title 19 makes the transaction value a touchstone for valuation of imports. Transaction value or "the price actually paid or payable" is "the total payment . . . made, or to be made, for imported merchandise by the buyer to . . . the seller." § 1401a(b)(4)(A). From this touchstone, title 19 authorizes deductions "for transportation, insurance, and related services incident to the international shipment of the merchandise." Id. Those deductions are not at issue in this case. Title 19 also enumerates other costs that Customs must exclude from transaction value, but only if they were identified separately from the price actually paid or payable. These costs include "[t]he customs duties and other Federal taxes currently payable on the imported merchandise." § 1401a(b)(3)(B). According to

title 19, the transaction value, the touchstone of duty calculation, does not include customs duties payable upon importation, if identified separately from the price actually paid.

Applying the statutory formula to this case, § 1401a(b)(3) explicitly excludes customs duties from the transaction value if identified separately to Customs. Therefore, because the record shows that the parties did not identify these duties separately, Customs has no authorization to deduct them from the price calculation. Beyond this straightforward application of the statute to this case, title 19 supplies further confirmation for Customs' refusal to deduct the duties from the transactional value. Because Molson reimbursed the duties after the date of importation, that post-importation action was in fact a rebate. See Black's Law Dictionary 1266 (6th ed. 1990). Section 1401a(b)(4)(B) directs Customs to disregard rebates after the date of importation. Thus Customs properly appraised the merchandise at the invoiced unit prices.

Miller paid an invoiced transfer price to Molson for its beer. In the agreement, this price was calculated without reference to any duties. Based on that "price actually paid" Miller paid duties on the beer to Customs. Thus the Court of International Trade correctly recognized that the Beer Agreement "resulted in a price (known as the 'Transfer Price') which was to be the same from Miller's point of view, no matter what the duty rate." Century, 19 F. Supp. 2d at 1124. The trial court erred by examining the transaction from Molson's perspective after importation and payment of the rebate: "[f]rom

Molson's point of view, what it actually received in payment was going to change depending on the duty paid." Id. Title 19 does not require Customs to discern a difference between the fixed sum paid by Miller to Molson and the variable sum received from Miller by Molson. Rather, title 19 directs that "[a]ny rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of importation . . . shall be disregarded in determining the transaction value." See § 1401a(b)(3). Therefore, the Court of International Trade erred in finding that the "transfer price" was a "duty-paid" price, i.e., that the price included duties upon which duties could not be charged according to § 1401a(b)(3)(B).

III.

In the declaration of its Import Specialist, Customs acknowledges that it might well have reached a different appraisal if it had been informed of the duty rebates at the time of importation. The Court of International Trade considered this omitted notice a simple error in the preparation of the entry papers and thus considered it remediable under 19 U.S.C. § 1520(c)(1) (1994), which states:

> [A] clerical error, mistake of fact, or other inadvertence . . . not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, [may give rise to a refund]

> when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation.

The Court of International Trade read § 1520 to give Miller a year to correct its failure to identify the "duty paid" invoice at the time of importation. To the contrary, § 1520 does not apply to this case.

Century's repeated failure to mark its documents "duty paid" falls outside the allowance for correction under § 1520(c)(1). Section 1520 extends a correction chance to "a clerical error, mistake of fact, or **other inadvertence**." (Emphasis supplied.) A correctable inadvertence under § 1520(c)(1) is easy to recognize because it is commensurate with, as the statute states, a "clerical error" or a "mistake of fact." In Aviall of Texas, Inc. v. United States, 70 F.3d 1248 (Fed. Cir. 1995) this court acknowledged a correctable inadvertence when the importer did not file certifications for duty-free import for one year. Because the importer had correctly filed these certifications for the eight previous years, and rectified his error for the ninth year immediately upon notification, this court concluded that the importer's error in the ninth year was a correctable "mistake which occurred through inadvertence." Id. at 1251. This court discerned in Aviall that a fact that was thought to exist (the certification) did not, in reality, exist.

The facts in Executone Information Systems v. United States, 96 F.3d 1383 (Fed. Cir. 1996) illustrate an uncorrectable inadvertence. In that case, this court

found that the importer had repeatedly failed to file documentation required for duty-free import, and also failed to show that this failure was due to a "mistake of fact or inadvertence," rather than "intentional or negligent inaction." Executone, 96 F.3d at 1389. Century is similar to Executone in that the importer repeatedly did not properly document its imports as "duty-paid." None of the four invoices of July 29, 1993, were marked duty-paid. Moreover, Century did not mark invoices over the entire period from April, 1993 (when the Miller-Molson agreement went into effect) to August 5, 1993 (when the fifty per cent duty was removed). Also, in its appeal to this court, Century did not demonstrate that this failure was due to a mistake of fact or inadvertence. Therefore Century falls within the rule of Executone.

Century's course of conduct with respect to the entries that occurred both before and after the entries at issue is relevant in demonstrating that its error is one of law. See Executone, 96 F.3d at 1390. The repetition of "inadvertence" may indicate an advertent misunderstanding of the law. In this case, Century's repeated failures to provide notice of the duty arrangements over a period of at least four months do not qualify as inadvertent clerical errors or as inadvertent mistakes of fact. Century might well have known that it was not marking its import documents "duty paid," but not have known it was operating under a misapprehension of the law. To use an alternative label, Century acted negligently. "[I]nadvertence does not stretch so far as to encompass intentional or negligent inaction." Ford Motor Co. v. United States, 157 F.3d 849, 860 (Fed. Cir. 1998) (citing Aviall, 70 F.3d at 1250 and Executone, 96 F.3d at

1389-90). Century's failure to provide notice falls outside the scope of inadvertence correctable under 19 U.S.C. § 1520(c)(1).

Correction is not possible if the error is one in the construction of law. See Aviall, 70 F.3d at 1250; see also, 19 C.F.R. § 173.4 ("Correction pursuant to . . . 19 U.S.C. [§] 1520(c)(1), may be made . . . if the clerical error, mistake of fact, or other inadvertence . . .[d]oes not amount to an error in the construction of a law."). Mistakes of law occur where the facts are known but their legal consequences are not, or are believed to be different than they really are. See Executone, 96 F.3d at 1387. Thus, misunderstanding or ignorance of the law does not qualify as a correctable inadvertence under § 1520.

IV.

Because the Court of International Trade mistakenly interpreted the Century's import transactions to be duty-paid imports, improperly assessed by Customs due to remediable error on the part of the importer, it erred in its grant of summary judgment. This court therefore vacates the grant of summary judgment to Century and reverses the denial of summary judgment to the United States.

COSTS

Each party shall bear its own costs.

VACATED and REVERSED.

United States Court of Appeals for the Federal Circuit

99-1117

CENTURY IMPORTERS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Before NEWMAN, Circuit Judge, dissenting.

I respectfully dissent. The Court of International Trade properly granted Century its statutory[1] right to

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[1] **19 U.S.C. §1520(c)(1).** A clerical error, mistake of fact, or other inadvertence . . . not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction [may give rise to a reliquidation or a reconciliation] when the error, mistake, or

correct the omission of notice of the "duty paid" status of the imported goods on its July 29, 1993 invoices. It is inappropriate, and incorrect, for this court to revoke that statutory right of correction.

The Customs Service readily acknowledged that it would have assessed the duty as Century proposes, and as required by §1401a(b)(3),[2] had it been advised that the invoice price included the duty. That the invoice itself did not so state was surely an error, mistake, or inadvertence as contemplated by §1520(c)(1). It is not disputed that the error, mistake, or inadvertence was unintentional. The Court of International Trade found that this was "an error in the preparation of the entry papers, so that the duty-paid nature of the price was not indicated at entry." An error in designation of a "duty

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inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation.

[2]**19 U.S.C. §1401a(b). Transaction value of imported merchandise.**

* * *

(3) The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable . . .

* * *

(B) The customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation . . .

paid" import transaction on the invoice is the kind of error for which Congress authorized correction.

The Customs usage of the term "duty paid " does not mean that the duty has already been levied and separately paid; it means that the invoice price includes the duty. When Customs is notified that goods are "duty paid" it assesses the duty accordingly, thus avoiding the levy of a duty on a duty.[3] The excess duty here levied was an improper assessment based on error and inadvertence, as was found by the Court of International Trade on the evidence. The error was not made by the Customs Service, but by the parties to the importation. Customs Agent Ryan testified that he was told of the duty arrangement "in mid '93," but that the liquidation did not take account of it because it was not on the invoice. The importer sought correction within a few days after the incorrect liquidation. Congress authorized the liberal correction of such errors, recognizing the complexities of international trade and the public interest in just and correct assessments.

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[3]The transaction value of the goods is calculated by dividing the "duty paid" price by 100% plus the duty rate. As an example, assume that the invoice price of the importation here at issue is $12. Since the duty rate is 50%, the transaction value of the goods is $12 divided by 150%; the transaction value is thus $8, and the duty is $4. Since Customs was not advised of the "duty paid" status this adjustment was not made; thus the importer paid a higher value for the goods, and Customs collected a duty on a duty, for a total duty of $6 in the example.

The majority opinion postulates that the error made by the parties was "negligently" repeated, transforming an otherwise correctable inadvertence into a non-correctable penalty. The decision before us relates to four invoices dated July 29, 1993 for four apparently concurrent shipments. There is no allegation of egregious inattention, as contrasted with simple error. Indeed, I wonder why an error becomes uncorrectable if made more than once. The request to correct the error and inadvertence was made promptly. Precedent well supports the correction of such errors. For example, in Aviall of Texas, Inc. v. United States, 70 F.3d 1248, 1249 (Fed. Cir. 1995) the failure to file an import certification was found by this court to be correctable. In Executone Information Systems v. United States, 96 F.3d 1383 (Fed. Cir. 1996) the court held that the failure to furnish documentation supporting a claim of duty-free entry would have been correctable but for the importer's "intentional or negligent inaction." Id. at 1389. The Customs Service has not charged that there was intentional or negligent inaction in this case. The panel majority's spontaneous fact-finding to this effect is unsupported by evidence.

The panel majority also classifies the arrangement between Miller and Molson as a post-importation "rebate." It was not a rebate[4] -- it was a simple agreement that the exporter would pay the customs duty, the agreement stating that "Molson will promptly pay or

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[4] REBATE, n. A return of part of a payment, serving as a discount or reduction. Blacks Law Dictionary 1273 (7th ed.1999).

reimburse [Miller] for the cost of the retaliatory import duties affecting imports of Canadian beer into the United States . . . ." It is thus inapt to rely on §1401a(b)(4)(B) (authorizing Customs "to disregard rebates after the date of importation") as authorizing the admittedly incorrect levy and barring its correction.

The refusal of the majority of this panel to permit the statutory right of correction in this case is inappropriate, unjust, and contrary to law.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ERRATA

April 20, 2000

Appeal No. 99-1117

Century Importers, Inc. v. United States
Precedential Opinion

Decided: March 3, 2000

Please note the following change to the Dissenting opinion of Judge Newman.

On March 3, 2000, when the entire opinion in the above appeal was up loaded onto the Bulletin Board System (BBS) of the court and the Web, portions of the text of the dissenting opinion of Judge Newman were re-arranged. The text was all there, but portions relating to footnotes were re-arranged in the conversion.

The text of the opinion has not been altered or changed in any way. The dissenting opinion has been corrected so the text is in the correct order. The entire opinion is being up loaded onto the BBS and Web as of this date April 20, 2000, so that it reads correctly.

The opinion up loaded on March 3, 2000 has been deleted.

APPENDIX B

UNITED STATES
COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-1117
CIT-95-02-00177

CENTURY IMPORTERS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

ORDER

A combined petition for panel rehearing and rehearing *en banc* having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing *en banc* having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing *en banc* be, and the same hereby is, DENIED.

The mandate of the court will issue on May 17, 2000.

Circuit Judge Schall did not participate in the vote.

FOR THE COURT,
/S/JAN HORBALY, CLERK
Jan Horbaly
Clerk

Dated: May 10, 2000

cc: BARBARA M. EPSTEIN
RUFUS E. JARMAN, JR.

CENTURY IMPORTERS V US, 99-1117
(CIT - 95-02-00177)

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* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *
*
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APPENDIX C

Slip Op. 98-119
UNITED STATES COURT OF INTERNATIONAL TRADE

CENTURY IMPORTERS, INC., Plaintiff,	Court No. 95-02-00177
UNITED STATES, Defendant.	

[Judgment for plaintiff.]

Dated: August 17, 1998

Barnes, Richardson & Colburn (Rufus E. Jarman and Frederic D. Van Arnam, Jr.) for plaintiff.

Frank W. Hunger, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Saul Davis and Barbara M. Epstein), Joseph M. Spraragen, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, Judge: This action is before the court on cross-motions for summary judgment, pursuant to USCIT Rule 56. The court has jurisdiction pursuant to 28 U.S.C. 1581(a) (1994), as plaintiff challenges denial of its protest of a Customs valuation decision with regard to beer imported from Canada.

FACTS

The merchandise at issue was imported via four entries made in 1993. At the time of entry normal duty rates had been replaced by a 50 percent duty. By virtue of a "Side Letter Agreement," dated January 14, 1993, the exporter, Molson Brewing Company, agreed to reimburse Miller Brewing Company for the duty paid.(1) One of Miller's subsidiaries, Century Importers, is the importer of record. Another subsidiary paid the original invoice price to Molson and after importation Molson reimbursed it for the duties paid. Thus, as of January 14, 1993, the sum total of the sales agreements resulted in a price (known as the "Transfer Price") which was to be the same from Miller's point of view, no matter what the duty rate. From Molson's point of view, what it actually received in payment was going to change depending on the duty paid. This appears to be essentially a "duty paid" price transaction. The parties, however, did not label this a "duty paid" transaction, nor did the papers submitted at entry reflect anything other than a unitary invoice price.

Plaintiff asserts that, nonetheless, this was a "duty paid" transaction and that this was revealed to Customs when plaintiff presented the side agreement to Customs prior to liquidation of the entries, together with evidence of the monetary adjustments made between Molson and Miller after

the duty was paid.(2) Defendant argues that it properly calculated transaction value for purposes of calculation of duties. Defendant states that there was only a transaction price, and it did not include duties. The adjustment for which plaintiff seeks credit, it asserts, is a post-importation rebate to price which is not relevant to the transaction value calculation. Post-importation adjustments to price are not considered in calculating the transaction value of the merchandise, but duties ultimately paid by the exporter are not dutiable if the duty is identified separately from the price. See 19 U.S.C. 1401a(b)(4)(B) (1988). The issue for the court to resolve, then, is whether a duty component of transfer price was identified separately from the price of the merchandise, and at what juncture the duty must be so identified.

DISCUSSION

It is clear from the statute and regulations that, for transaction value purposes, it does not matter what method is used to arrive at the price. See 19 U.S.C. 1401a(b) (1988); see also 19 C.F.R. 152.103 (1993)("the price . . . will be considered without regard to its method of derivation.")(4) Thus, neither Molson or Miller's understanding of the value of the goods, nor the sequence of documents or any other similar matter is relevant. Price is determinative, no matter how it is reached. Further, repayment of duties to the importer after importation to fulfill the bargain in a "duty paid" sale is not a "rebate of price" within the meaning of 19 U.S.C. 1401a(b)(4) (1988).(5) The importer pays the duty in the first instance and the exact amount of duty is not known until liquidation, which occurs after importation. See Deposition of John T. Ryan, at 18, 20, Def.'s Opp. Br., at Ex. F, at 5, 6. (U.S. Customs Field National Import Specialist, as representative of defendant)

[hereinafter "Ryan Deposition"]. Both parties agree that the net payment to the exporter, which is usually made after importation, would not include the amounts paid as duty, in the normal duty paid price case. Defendant has not demonstrated that a post-importation adjustment between the parties solely on account of the duties paid by the importer is substantively different from a post-importation net payment that excludes duties paid by the importer.

The court concludes there is no conflict between the direction of 19 U.S.C. 1401a(b)(3)(B) not to calculate a transaction value which includes an identified customs duty and the direction of 19 U.S.C. 1401a(b)(4) not to lower the transaction value price to reflect post-importation rebates of price. A repayment of identified duties is not a "rebate of price" within the meaning of the statute. The statute clearly distinguishes between duty adjustments and adjustments to price. As neither Allied International v. United States, 16 CIT 545, 795 F. Supp. 449 (1992), nor Esprit De Corp. v. United States, 17 CIT 195, 817 F. Supp. 975 (1993), relied on by defendant, involved post-importation repayment of duty in a "duty paid" transaction, they are inapposite.

As indicated, it is undisputed that at the time of entry, the sales price contained in the invoices accompanying the entry papers did not indicate to Customs that the transaction involved a duty paid sale. The issue is whether this is crucial and whether plaintiff is precluded from providing the information at a later date. The statute suggests that the entry documentation should break out the price from the duty, see 19 U.S.C. 1401a(b), but the Ryan deposition makes clear that all that is needed in the entry documentation is an indication that the sales price is "duty paid," because specific duty rates are

applicable and Customs uses a formula to calculate the price portion of the "duty paid" price. Ryan Deposition, at 20, Def.'s Opp. Br., at Ex. F, at 6. Thus, to Customs, duties are separately identified as long as the transaction is denominated "duty paid." It is not necessary to say, X amount is the price portion and Y amount is the duty portion. In any case, by the time of liquidation, the original duty portion of the transfer price was identified because the adjustments were known.

What occurred in this case was an error in the preparation of the entry papers, so that the duty-paid nature of the price was not indicated at entry. Under 19 U.S.C. 1520(a) (1988), documentary errors of this type in entry papers ordinarily may be corrected. Thus, while it is optimal to identify "duty paid" status at entry, it may be so indicated to Customs prior to liquidation, if the omission is due to clerical error. 19 U.S.C. 1520(a)(4). Further, the statute permits correction of other factual errors both before and within one year after liquidation. See 19 U.S.C 1520(c) (1994). If there is some reason why a factual mistake in the identification of the "duty paid" nature of a sales price should be treated differently from any other mistake of fact, it has not been demonstrated by defendant. Moreover, even if the statute could be interpreted to permit Customs to impose a more stringent test for the correction of this type of error, one would expect regulations to spell out the inapplicability of normal correction measures. There is nothing in the statutes or regulations, however, which indicates that failure to identify the "duty paid" status of a sale at the time of entry is an error which may never be corrected. For example, if the statute actually said identified at time of entry or within X days thereafter, one would have a better argument that timing was of the essence.

The court notes that because amounts of duty are easily determined by applying the specific rates set forth in domestic law, there is no fact-finding required by Customs, once it knows that the transaction is "duty-paid." Thus, the concern expressed in Generra Sportswear Co. v. United States, 905 F.3d 377, 380 (Fed. Cir. 1990) (citing Moss Mfg. Co. v. United States, 896 F.2d 535, 539 (Fed. Cir. 1990)), that Commerce not engage in a "formidable fact-finding task" in valuing merchandise, is not raised. The legislative history of the statutory provision at issue makes clear that a simplified valuation regime was intended. S. Rep. 96-249, at 119 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 505 (The amendments "represent a simplification of U.S. law and add significantly more predictability regarding the value which will be used for customs purposes."). There is no indication, however, that simple mistakes may not be corrected, particularly where, as here, the inquiry to be made by Customs is not complicated by fact finding Congress intended would be avoided.

Accordingly, the court finds that if "transaction value" valuation methodology applies to these entries, plaintiff will prevail. Defendant has belatedly indicated that it might not have applied transaction value if it had viewed this as a "duty paid" situation, but it did not plead in the alternative to reevaluate the entries under another valuation methodology. Further, Customs did not propose to examine the relatedness of parties with an eye to using another valuation method, even when it knew the size of what it considered a "rebate." Thus, the argument that the size of the duty in a duty-paid sale would have triggered an investigation which might have resulted in use of another valuation methodology seems disingenuous. In any case, the court accepts the pleadings as they are, as well as

the parties' mutual assertions that all material facts are not in dispute.

Judgment is entered for plaintiff. Entry Nos. 112-5838964-9, 112-6033706-5, 112-6033707-3, and 112-6033750-3 shall be revalued and reliquidated in accordance with this opinion, and refund shall be made to plaintiff with interest thereon, as provided by law.

/S/ Jane A. Restani
Jane A. Restani
JUDGE

Dated: New York, New York
This 17th day of August, 1998.

- NOTES -

98-119.WP FN-1
The "Side Letter Agreement" was signed at the same time as were various "Alliance Agreements" among Molson, Miller and various affiliates, governing the sale of beer.
98-119.WP FN-2
There appears to be no dispute between the parties that the adjustments were actually made with respect to the entries at issue.
98-119.WP FN-3
The statute provides, in relevant part:
(b) Transaction value of imported merchandise

(1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to -

(A) the packing costs incurred by the buyer with respect to the imported merchandise;

(B) any selling commission incurred by the buyer with respect to the imported merchandise;

(C) the value, apportioned as appropriate, of any assist;

(D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and

(E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

***

(3) The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable and from any cost or other item referred to in paragraph (1):

* * *

(B) The customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation, and any Federal excise tax on, or measured by the

value of, such merchandise for which vendors in the United States are ordinarily liable.

19 U.S.C. 1401a(b) (1988).
98-119.WP FN-4
The regulations provide, in relevant part:

152.103Transaction value

(a) Price actually paid or payable -

(1) General. In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation. It may be the result of discounts, increases, or negotiations, or may be arrived at by the application of a formula, such as the price in effect on the date of export in the London Commodity Market. The word "payable" refers to a situation in which the price has been agreed upon, but actual payment has not been made at the time of importation.

***

19 C.F.R. 152.103(a) (1993). The regulations continue:

(i) Exclusions from transaction value. The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable and from any cost or other item referred to in paragraph (b) of this section:

***

(2) The customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation, and any Federal excise tax on, or measured by the value of, the merchandise for which vendors in the United States ordinarily are liable.

19 C.F.R. 152.103(i) (1993).

98-119.WP FN-5
The statute provides:

(4) For purposes of this subsection -

(A) The term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

(B) Any rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of the importation of the merchandise into the United States shall be disregarded in determining the transaction value under paragraph (1).

19 U.S.C. 1401a(b)(4) (1988).

(2)

Supreme Court, U.S.
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No. 00-196

In the Supreme Court of the United States

CENTURY IMPORTERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the statute permitting the correction of mistakes of fact after liquidation of customs duties, 19 U.S.C. 1520(c), is not applicable to this case, or whether, as alleged by petitioner, the court held that Section 1520(c) precluded the importer from raising issues of law and related facts subsequent to entry of the merchandise.

2. Whether the court of appeals correctly held that the Customs Service, in determining the value of imported merchandise for purposes of assessing *ad valorem* duties, properly calculated the "transaction value" of the merchandise on the basis of the price actually paid or payable by the buyer to the seller of the merchandise, rather than on the basis of the net profit remaining to the seller, determined by deducting a post-importation rebate of duties from the seller to the buyer from the price paid by the buyer.

3. Whether the court of appeals correctly held that the Customs Service, in assessing the transaction value of the imported merchandise, properly determined not to deduct import duties from the price actually paid by the buyer to the seller in light of the fact that import duties were not a component of that price and, therefore, were not separately identified to Customs at entry.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 205 F.3d 1308. The opinion of the United States Court of International Trade (CIT) (Pet App. 21a-30a) is reported at 19 F. Supp. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. A petition for rehearing was denied on May 10, 2000 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on August 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Century Importers, Inc., filed an action in the CIT seeking a refund of import duties, based upon its claim that the Customs Service (Customs) had incorrectly appraised its merchandise under the "transaction value" statute, 19 U.S.C. 1401a(b). Pursuant to Section 1401a(b)(1), the transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States (plus certain amounts not relevant to this action). Pet. App. 5a-6a. The term, "price actually paid or payable" is defined in Section 1401a(b)(4), in relevant part, as "the total payment * * * made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller."

2. The imported merchandise at issue here consisted of beer imported by petitioner, on behalf of Miller Brewing Company (Miller). Miller had purchased the beer from the seller/exporter, Molson Breweries (Molson) of Toronto, Canada, at a price which was termed the "transfer price." Pet. App. 2a. The "transfer price," also characterized as the "invoice price," was the price listed on the entry papers by the importer as the price actually paid by the buyer (Miller) to the seller (Molson). Customs appraised the merchandise on the basis of the "invoiced transfer price" because that was the price actually paid by the buyer to the seller. As indicated in petitioner's Complaint filed in this action,[1] and admitted by petitioner,[2] that "transfer

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[1] Complaint ¶ 13; Confidential Joint Appendix Before the Court of Appeals (Conf. C.A. App.) 30-31.

[2] Defendant's Statement of Material Facts Not in Issue, attached to its Cross-Motion for Summary Judgment ¶ 9 ("deemed

price" did not include any component for import duties. Import duties were paid by petitioner to Customs, separate and apart from the price actually paid by the buyer (Miller) to the seller (Molson) for the beer. Subsequent to importation, the seller (Molson) reimbursed the buyer (Miller) for the additional duties the buyer had paid to Customs.[3]

3. Petitioner's claim in this case was based upon its contention that, because the seller reimbursed the duties to the buyer subsequent to importation, and therefore the profit remaining to the seller was reduced from the actual price paid, the amount of duties should have been deducted from the transaction value pursuant to 19 U.S.C. 1401a(b)(3), which states that transaction value does not include duties if identified separately from the price actually paid or payable. The government maintained that no duties could be deducted from the price actually paid by the buyer to the seller because no duties had been included in that price. The government also argued that, even if duties had been included in the transfer price, they were not "separately identified" at entry from the invoice price, as required by statute, and therefore still could not be deducted.

Additionally, the government argued in the alternative that, even if duties had been included in the

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admitted" by petitioner); Conf. C.A. App. 56; Deposition of Plaintiff, by Ann Zegarchuk, Plaintiff's Designated Representative (agent) 70-72; Conf. C.A. App. 431-433.

[3] Using figures relating to one of the entries in this case, as an example, the "transfer/invoice price" paid by Miller to Molson for the beer was $4,208, and Customs correctly determined that the transaction value of the merchandise was $4,208. The 50% duties ($2,104) were paid in addition to the $4,208 price, and that additional amount of $2,104 was later reimbursed to Miller by Molson.

transfer price, they would properly be disregarded in calculating transaction value, by virtue of 19 U.S.C. 1401a(b)(4)(B), which provides that "[a]ny rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of the importation * * * shall be disregarded in determining the transaction value."

4. The parties cross-moved for summary judgment in the CIT. The court granted summary judgment to petitioner, holding that import duties should have been deducted by Customs from the "transfer price" of the merchandise in calculating "transaction value." Pet. App. 21a-30a. The CIT acknowledged that the price actually paid by the buyer to the seller (the transfer price) would remain the same for the buyer, regardless of the duties paid to Customs in addition to that price. However, the court held, because the seller reimbursed the buyer for the duties, and this reimbursement resulted in a lesser price ultimately received by the seller, the transaction was a "'duty paid' price transaction." *Id.* at 22a. The court concluded, therefore, that Customs erred in not deducting the duties from the transfer price in calculating the value of the merchandise. The court recognized that it was undisputed that, at the time of entry, the invoice price did not separately identify duties. *Id.* at 24a. It determined, nonetheless, that petitioner's failure to separately identify the duties from the price paid or payable at entry did not defeat its claim because it was merely an inadvertence or mistake of fact. The CIT indicated that, since a "mistake of fact" would be correctable under 19 U.S.C. 1520(c)(1), which provides, in essence, for corrections of a clerical error or mistake of fact in an action in which a timely protest is not filed, the error here should also be

correctable. Pet. App. 25a.[4] The court also concluded that the reimbursement of duties, subsequent to importation, was not a rebate or reduction in price within the meaning of Section 1401a(b)(4)(B). *Id.* at 23a.

5. The court of appeals reversed, with one judge dissenting. Pet. 1a-18a. The court of appeals held that, in accordance with Section 1401a(b)(1), transaction value should properly be based upon the price paid or payable by the buyer to the seller, and that Customs, in calculating transaction value, is not required to discern a difference between the fixed sum actually paid by the buyer, and the variable sum that is received by the seller as a result of any reimbursement made by the seller to the buyer. *Id.* at 8a. The court of appeals held that CIT erred in finding that the "invoice transfer price" was a duty-paid price, *i.e.*, that the price included duties. *Ibid.* The appellate court also held that, because the statutory formula set forth in Section 1401a(b)(3) prescribes that duties may be deducted from transaction value if separately identified, Customs was not authorized to deduct them here, because the importer failed to separately identify any duties from the price actually paid (the transfer price). *Id.* at. 7a. The court of appeals further ruled that the CIT erred in reading Section 1520 as giving the importer a year to correct its failure to identify the "duty paid" invoice at the time of entry, because Section 1520 does not apply to this case. *Id.* at 9a. The appellate court additionally

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[4] Thus, although the action here was not brought pursuant to Section 1520(c), because a timely protest was filed, the CIT justified the importer's failure to separately identify duties by finding that deficiency was a "mistake of fact," and then analogized it to a mistake of fact which would be correctable under Section 1520(c).

held that, because the post-importation reimbursement of duties was in fact a rebate, Customs was required to disregard the payment in determining the price actually paid in accordance with Section 1401a(b)(4)(B). *Id.* at 7a.[5]

ARGUMENT

1. Petitioner mischaracterizes the appellate court's decision as holding that 19 U.S.C. 1520(c) limits the rights of an importer to obtain *de novo* judicial review in an action brought pursuant to 19 U.S.C. 1514(a). Pet. 16, 24. Contrary to petitioner's argument, the Federal Circuit did not hold that an importer's error at entry may be remedied only under Section 1520(c) rather than Section 1514 (Pet. 20, 24), or that an importer is precluded from raising new facts or legal issues in a judicial proceeding brought pursuant to Section 1514 (Pet. 16). It is abundantly clear that petitioner did obtain *de novo* review in the CIT under Section 1514(a), and the Federal Circuit explicitly held that Section 1520(c) is not even applicable to this action. Pet. App. 9a. Thus, the central issue raised by petitioner here is simply a "non-issue," and there is no reason for this Court to grant the petition for a writ of certiorari.

The Federal Circuit's decision, in actuality, involves a careful and legally sufficient analysis of the transaction value statute, 19 U.S.C. 1401a(b), in light of petitioner's

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[5] Judge Newman dissented. Pet. App. 13a-17a. Contrary to the majority, she concluded that Section 1520 applies to this case and that the importer should have been permitted to advise Customs that the invoice price included duties, notwithstanding its failure to separately identify the duties at entry. *Id.* at 14a-15a. Judge Newman also concluded that Section 1401a(b)(4)(B) does not apply to this case because the seller's agreement to reimburse the duty after importation was not a "rebate." *Id.* at 16a-17a.

claim that, in appraising its merchandise, Customs should have deducted a post-importation rebate of duties from the price the buyer had actually paid the seller, pursuant to Section 1401a(b)(3)(B). The court of appeals correctly held that, pursuant to the proper legal interpretation of various sections of the transaction value statute, Customs accurately calculated the transaction value of the imported merchandise based upon the undisputed facts of this case. That holding does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

2. The Federal Circuit's holding that Customs properly calculated the transaction value of the imported merchandise is based primarily upon its correct textual analysis of Sections 1401a(b)(1) and (4)(A), and their application to the facts of this case. Pet. App. 5a-7a. The appellate court correctly held that, in accordance with the plain language of the pertinent provisions, transaction value is based upon the total payment made or to be made by the buyer to the seller of the merchandise, and "Section 1401a(b)(4)(B) directs Customs to disregard rebates after the date of importation." *Id.* at 7a. In this case, it was undisputed that the total price actually paid by the buyer to the seller (the "invoiced transfer price"), which was the price properly used by Customs to appraise the merchandise, did not include any component for duties. Inasmuch as the transfer price did not include any component for duties, the Federal Circuit correctly held that the CIT erred in finding that the transfer price was a "duty-paid price." *Id.* at 8a.

The Federal Circuit's conclusion is supported by the record, which clearly indicates that the duties paid by the importer were in addition to the transfer price; not

a component of the transfer price.[6] Petitioner argued, however, that because the seller reimbursed the buyer for additional duties subsequent to importation, and the seller was therefore left with less profit, the transaction was, in effect, a "duty-paid" transaction. Pet. 12.; Pet. App 3a-4a. The appellate court correctly held that the CIT erred by examining the transaction from the seller's perspective after importation and payment of a rebate, whereas the statute requires Customs to calculate the value of merchandise on the basis of the price paid by the buyer, and not on the basis of the sum ultimately received by the seller after a post-importation rebate. *Id.* at 7a-8a. Although petitioner apparently argues that the Federal Circuit's discussion of Section 1520(c), in a later portion of the decision, prevented the importer from raising legal claims in the court after the date of entry and administrative review (Pet. 16), that discussion of Section 1520(c) had no material bearing on the Federal Circuit's holding that Customs correctly calculated the transaction value of the importer's merchandise by appraising the merchandise on the basis of the price actually paid by the buyer to the seller, as required by Sections 1401a(b)(1) and (4)(A).

3. As indicated by the Federal Circuit, the importer argued that because the seller had, in reality, reduced the price of its merchandise by agreeing to reimburse the buyer for duties after importation, such reimbursement should be deducted in determining transaction value. Pet. App. 4a. See also Pet. 12. As correctly

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[6] Complaint ¶ 13; Conf. C.A. App. 30-31; Defendant's Statement of Material Facts Not in Issue, attached to its Cross-Motion for Summary Judgment ¶¶ 9, 10 ("deemed admitted" by petitioner); Conf. C.A. App. 56; Deposition of Plaintiff by Is Representative (agent) Zegarchuk 41; Conf. C.A. App. 402.

stated by the appellate court, however, Section 1401a(b)(4)(B) states that a post-importation rebate or reduction in the price actually paid shall be disregarded in determining the transaction value. Pet. App. 6a. Inasmuch as it is undisputed that the reimbursement here was made subsequent to importation, Section 1401a(b)(4)(B) confirms that Customs correctly disregarded any post-importation rebate in determining transaction value. That conclusion is also supported by the reasoning of two prior analogous decisions of the CIT, *Esprit de Corp* v. *United States*, 817 F. Supp. 975 (1993), and *Allied International* v. *United States*, 795 F. Supp. 449, 453 (1992), which held that reimbursements made or effected subsequent to entry should be disregarded in determining transaction value, by virtue of Section 1401a(b)(4)(B).

4. The Federal Circuit further supported its conclusion by reference to the plain language of Section 1401a(b)(3). Under Section 1401a(b)(3), even if we assume duties had been included in the total price actually paid by the buyer to the seller, a statutory prerequisite for deducting those duties from the transaction price is that they be "identified separately" from the total price paid or payable by the buyer. It is undisputed that the importer here did not separately identify any duties from the price paid or payable by the buyer to the seller. Pet. App. 7a. The court of appeals therefore correctly held that, under a straightforward application of the statute to this case, Customs had no authorization to deduct duties not separately identified, and hence Customs properly appraised the merchandise at the invoiced unit price. *Ibid.*

Although unnecessary to its actual holding, the Federal Circuit then addressed comments by the CIT, the dissenting judge, and petitioner, which erroneously

applied Section 1520(c) to the facts of this case. Contrary to petitioner's claim that the appellate court held that Section 1520(c) limited the rights of the importer, the court of appeals actually held that Section 1520(c) "does not apply to this case," inasmuch as the importer's failure to satisfy the statutory requirements of the transaction value provisions is not the type of error that is remediable under Section 1520(c). Pet. App. 9a.

The discussion of Section 1520(c) arose from the government's secondary argument in the CIT that, even if we assume the price actually paid by the buyer to the seller included duties (which it did not), the duties would not have been properly deductible from the price paid by the buyer, as claimed by the importer, because they were not separately identified to Customs at entry, as required by Section 1401a(b)(3). The government pointed out that the requirement that the importer must advise Customs at the point of entry of any duties included in the invoice price was supported by the reasoning of the Federal Circuit in *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 380 (1990), and *Moss Manufacturing Co.* v. *United States*, 896 F.2d 535, 539 (1990), which indicated that, in appraising merchandise, Customs was not expected to engage in extensive fact-finding at the administrative level to discern whether a price provided to it as the basis of transaction value actually includes duties and/or other costs which, by statute, must be separately identified by the importer.

The CIT, rather than comprehensively addressing the government's primary argument that the transfer price did not include any duties that could be deducted from the actual value of the imported goods, focused instead on the government's alternative argument that, in any event, duties could not be deducted because they

were not separately identified at entry. The CIT then analogized the importer's failure to separately identify the duties on the entry papers to a "mistake of fact," which would be correctable under Section 1520(c) in a situation in which no protest had been timely filed. Pet. App. 24a-25a.

The dissenting judge in the court of appeals apparently misapprehended the CIT's opinion as holding that the error here was the type of error correctable under Section 1520(c), and mistakenly indicated that petitioner should be allowed to correct the error, pursuant to that statute. As now acknowledged by petitioner, this action was not brought pursuant to Section 1520(c) and cannot be corrected pursuant to that provision. Pet. 16, 17, 21, 22. At the appellate level, however, petitioner attempted to rely upon Section 1520(c). Contrary to petitioner's statement to this Court that neither party raised nor briefed issues involving Section 1520(c) (Pet. 24), petitioner itself did brief the issue in its "appellee brief" (at 38-42), in which it attempted to utilize the CIT's reasoning relating to Section 1520(c) as justification for its failure to separately identify duties at entry. Petitioner erroneously contended in its brief before the court of appeals that no statute requires that Customs be informed of the duty-paid nature of a transaction at entry, and specifically stated that "the CIT pointed out correctly that such a conclusion would fly in the face of 19 U.S.C. § 1520."[7] In response to the various references to Section 1520(c), the majority in the Federal Circuit analyzed the statute, and correctly and expressly held that Section 1520(c) does not apply to this case. Pet. App. 9a.

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[7] Appellee Br. 41.

Accordingly, as the court of appeals held, Customs properly calculated the transaction value of the imported merchandise and the importer, therefore, is not entitled to its claimed post-importation refund of duty. Nor does the decision of the court of appeals that Section 1520(c) has no application here implicate any conflict between Sections 1514(a) and 1520(c), as contended by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

UNITED STATES,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF PARTIES

The caption identifies all parties to the proceeding in the court whose judgment is sought to be reviewed.

The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the petitioner are Phillip Morris Co. and The Molson Companies, Ltd.

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UNITED STATES,

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TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Century Importers, Inc. ("Century") respectfully submits this reply brief in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeal for the Federal Circuit ("Court of

Appeals") in this case.

1. In its Brief for the United States in Opposition ("Opp."), the respondent United States argues that the appellate court's "discussion of Section 1520(c) [19 U.S.C. § 1520(c)] had no material bearing on the Federal Circuit's holding that Customs correctly calculated the transaction value of the imported merchandise . . . " (Opp. at 8), while at the same time agreeing with the petitioner that "this action was not brought pursuant to Section 1520(c) and cannot be corrected pursuant to that provision." Opp. at 11. The fact that both parties acknowledge that the appellate court analyzed the wrong statute is strong evidence that the entire decision is tainted. The appellate court spent pages analyzing Section 1520(c), concluding that the error at issue was one of law that could not be corrected under Section 1520, when the importer, however, was seeking not correction of an error but reappraisement under 19 U.S.C. 1514(a)(1), the statute pursuant to which the case was filed.

It is respectfully submitted that the entire decision of the appellate court was colored by its holding that a non-correctable error of law occurred. The appellate court noted the respondent's admission that "it might well have reached a different appraisal if it had been informed . . ."

of the error.[1] The respondent makes much of the court of appeals' statement that "§ 1520 does not apply to this case," (Pet. App. 9a, cited at Opp. 10 and 11) taking this phrase out of context and suggesting that this statement means that § 1520 should not be applied to the facts of this case. In reality this phrase was the court's way of indicating that it did apply § 1520(c) to the facts of this case and found that it did not authorize relief.

2. The respondent also argues that the repayment of the customs duties by the exporter was a rebate, noting repeatedly that the payment was made after entry (Opp. at 8, 9) as if this simple fact were determinative. The respondent fails ever to acknowledge that the exporter's contractual obligation to reimburse the customs duties to petitioner was created months before the imports in questions were entered into the United States (Petitioner's Brief, Appendix 3a), and that the obligation of an importer to pay duty does not arise until after the merchandise is entered into the United States. Thus, any reimbursement of customs duties pursuant to a duty-paid contract term of sale must occur after the entry.

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[1] The dissent more accurately stated that the "Customs Service readily acknowledged . . ." that it would have appraised in a manner as proposed by the petitioner but for the presence of the error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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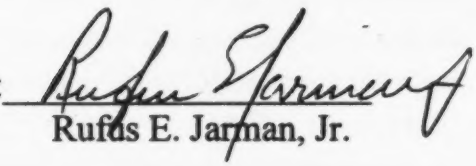
By: 
Rufus E. Jarman, Jr.

Dated: October 23, 2000